94-1734

No. 94-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

LANSING DAIRY, INC., *et. al.*,

Petitioners,

v.

DAN GLICKMAN,
SECRETARY OF AGRICULTURE, and

PRODUCERS EQUALIZATION COMMITTEE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PRODUCERS EQUALIZATION COMMITTEE'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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May 17, 1995

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. If the statute at issue is ambiguous, did the Sixth Circuit Court of Appeals properly uphold the agency's interpretation of the statute, where the interpretation was reasonable and not inconsistent with the expressed intent of Congress?

2. If the statute at issue is not ambiguous, did the Sixth Circuit Court of Appeals nevertheless reach the correct result in this case by upholding the agency's interpretation of that statute, where the interpretation conforms to the plain meaning of the statute?

COUNTER-STATEMENT OF PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The Producers Equalization Committee ("P.E.C.") does not contest this section of Petitioners' petition, but adds that as of the commencement of this case, the P.E.C. was an unincorporated association of four dairy farmer organizations (Independent Cooperative Milk Producers Association, Inc., Michigan Milk Producers Association, National Farmers Organization, Inc., and Southern Milk Sales, Inc.). Southern Milk Sales, Inc., as of October 31, 1989, is no longer marketing milk or representing dairy farmers in Michigan. As of February 1, 1995, Mid-America Dairymen, Inc. is also a member of the P.E.C.

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COUNTER-STATEMENT OF THE CASE

These consolidated actions arose under the Agricultural Agreement Marketing Act of 1937 ("Act"), 7 U.S.C. §§ 601 et. seq., which authorizes the Secretary of Agriculture ("Secretary") to issue rules controlling the marketing of milk.[1] Intervenor Producers Equalization Committee ("P.E.C.") is an unincorporated association of dairy farmer ("producer") organizations that proposed amendments to Federal Order 40, 7 C.F.R. §§ 1040 et. seq., which governs the marketing of milk in the southern Michigan marketing area. Based on evidence that was introduced at a public hearing, the Secretary adopted the P.E.C.'s proposals. 54 Fed. Reg. 26768 et. seq. (1989) (App., 70a-126a).[2]

Petitioners are regulated milk processors ("handlers"), who operate "pool plants." See generally, 7 C.F.R. §§ 1040.7, 1040.9. This litigation concerns Petitioners' challenge to two of the four amendments approved by the Secretary. These amendments concerned: (1) the plant location adjustments for handlers, 7 C.F.R. § 1040.52 ("zone location adjustments"); and (2) the mileage adjustments for plants located outside of the southern Michigan marketing area, 7 C.F.R. § 1040.52(a)(2) ("mile-

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[1] For background information on the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601 et. seq., see United States v. Rock Royal Co-op., 307 U.S. 533; 83 L. Ed. 1446; 59 S. Ct. 993 (1938); Defiance Milk Products Co. v. Lyng, 857 F. 2d 1065 (6th Cir., 1988); Lewes Dairy, Inc. v. Freeman, 401 F. 2d 308 (3d Cir., 1968), cert. den. 394 U.S. 929; 22 L. Ed. 2d 455; 89 S. Ct. 1187 (1969).

[2] Citations to the Appendix refer to the Appendix attached to Petitioners' petition for a writ of certiorari.

age rate" or "mileage location adjustment"). These adjustments for location are specifically authorized terms and conditions of milk marketing orders under 7 U.S.C. § 608c(5)(A) and (B). The Secretary relied on 7 U.S.C. § 608c(5) in amending the location adjustments to the minimum price that handlers must pay to producers for milk (App., 99a-100a). Petitioners argue, however, that the Secretary was required to evaluate the P.E.C.'s proposed amendments under factors set forth in 7 U.S.C. § 608c(18).[3]

The zone location and mileage location adjustments are adjustments to the base minimum price of milk which are used to economically encourage the movement of producer milk from rural production areas to plants in population centers and to align minimum prices among neighboring markets. See Walmsley v. Block, 719 F. 2d 1414, 1418-19 (8th Cir., 1983); Sunny Hill Farms Dairy Co., Inc. v. Hardin, 446 F. 2d 1124, 1128 (8th Cir., 1971), cert. den. 405 U.S. 917; 30 L. Ed. 2d 786; 92 S. Ct. 940 (1972). In Order 40, this encouragement is provided by a negative adjustment that "lowers" minimum prices for producer milk that is delivered to plants in rural locations, and a positive adjustment that "increases" minimum prices for milk that is delivered from rural production areas to plants in urban areas. Location and mileage adjustments reflect the fact that a handler who receives milk near consuming centers has a more valuable commodity than a handler who receives milk in a rural area and then must undertake the burden of transporting the milk to

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[3] Portions of 7 U.S.C. § 608c and 7 C.F.R. § 1040 are reproduced in Petitioners' Appendix, at 268a-278a.

consumer markets. Schepps Dairy v. Bergland, 628 F. 2d 11, 15-16 (D.C. Cir., 1979).

Petitioners challenged the validity of the amendments in a proceeding before the Secretary pursuant to 7 U.S.C. § 608c(15)(A). An Administrative Law Judge ("A.L.J.") concluded that the amendments were illegal, reasoning, in part, that the Secretary should have considered 7 U.S.C. § 608c(18)'s, factors in enacting the amendments (Initial Decision and Order; App., 208a-265a).[4] On appeal, however, the Secretary's Judicial Officer upheld the amendments (App., 61a-207a). The Judicial Officer explicitly rejected the A.L.J.'s reasoning, explaining that (1) the A.L.J. misinterpreted the separate and distinct applications of §§ 608c(5) and (18) in different situations; (2) for "over 50 years, it has been the contemporaneous and settled construction of the Act that changes in Class [minimum] prices are subject to § 8c(18) analysis, but that changes in location adjustments are not subject to a § 8c(18) analysis;" and, (3) the A.L.J. misread and misapplied the Judicial Officer's decision in In re Borden, Inc., 46 Agric. Dec. 1315 (1987), aff'd. No. H-88-1863 (S.D. Tex., 1990) in erroneously striking down the amendments (App., 185a-186a).

Petitioners then filed an action for review, declaratory relief, and money damages in the District Court pursuant to 7 U.S.C. § 608c(15)(B). On March 30, 1992, the District Court

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[4] Throughout their petition, Petitioners refer to various other arguments that they have made, and which have been rejected at various points in the appellate process. The P.E.C. does not address these arguments, since they are irrelevant to the questions presented in Petitioners' petition for a writ of certiorari.

granted Petitioners' motion for summary judgment (App., 41a-60a). The Court recognized that 7 U.S.C. § 608c(18)'s "minimum price" term was not defined by the statute, nor by the Secretary in any regulation, and that no case has defined or specifically discussed the precise meaning of this phrase. Nevertheless, the District Court found that the statute was not ambiguous; accordingly, the Court did not defer to the Secretary's interpretation under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837; 81 L. Ed. 2d 694; 104 S. Ct. 2778 (1984). The Court essentially reasoned that the term "minimum price" encompasses adjusted prices that must necessarily affect the minimum price, so any proceeding amending permitted adjustments to prices must conform to the requirements of a proceeding to set the original minimum price (App., 53a-54a).

The Sixth Circuit Court of Appeals unanimously reversed the District Court, and upheld the amendments (App., 1a-40a). Applying the first part of the Chevron analysis, the Court of Appeals rejected the District Court's finding that the statute was not ambiguous (App., 20a-23a). The Court then addressed the parties' arguments relating to the second part of the Chevron analysis, and concluded that because "the language of the Act and the legislative history are not unambiguous and the Secretary's interpretation is neither unreasonable nor in conflict with Congress' intent, we are bound by Chevron to uphold the Secretary's interpretation" (App., 32a). The Court later denied Petitioners' petition for rehearing and rehearing *en banc*.

SUMMARY OF ARGUMENT

Petitioners' petition for a writ of certiorari lacks merit and should be denied. Petitioners essentially present Chevron arguments in reverse order — first arguing that the statute is ambiguous and should bear the interpretation that they desire, without deference to the Secretary's interpretation; and then arguing that the statute is not ambiguous, but still should bear the interpretation that they desire. In response, the P.E.C. first argues that if the statute is ambiguous, the Sixth Circuit Court of Appeals correctly found itself bound to uphold the Secretary's reasonable interpretation of the statute under this Court's clear precedent. Petitioners' arguments do not even challenge the fundamental and controlling reasonableness analysis, and therefore cannot alter the outcome of this case. There is no conflict among the circuit courts of appeals on this matter. Moreover, the Secretary's decision is entitled to deference, even if he changed his position (which the Secretary has consistently denied).

Second, the P.E.C. maintains (as it argued below) that the Petitioners' and the District Court's interpretation of the statute was contrary to the statute's plain meaning, which should be given effect. The statute's plain meaning conforms to the Secretary's interpretation. Thus, the Court of Appeals correctly reversed the District Court, and upheld the Secretary's decision, but for the wrong reason. In any event, the correct result has been achieved, and there is no aspect of this case that warrants further judicial proceedings.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY DEFERRED TO THE SECRETARY'S INTERPRETATION OF THE STATUTE.

Petitioners' first argument (Petition, pp. 10-14) misconstrues the Court of Appeals' decision, and the controlling case law. The Court of Appeals upheld the Secretary's interpretation of the statute because that "interpretation is neither unreasonable nor in conflict with Congress' intent" (App., 32a). For these reasons alone — regardless of any deference that might have been appropriate — the Court of Appeals was bound by this Court's precedent to uphold the Secretary's decision. Since there is no sound basis to believe that the courts of other circuits would have misapplied the law, there is no merit in Petitioners' attempt to have their petition granted through an argument that the Court of Appeals' decision conflicts with the decisions of courts of appeals of other circuits (Petition, pp. 10, 14).

The Court of Appeals (App., 32a) correctly found itself bound by Chevron to uphold the Secretary's "reasonable" interpretation of a statute concerning a "gap" left open by Congress. 467 U.S. at 843-44. For an agency's interpretation of a statute to be upheld as permissible, that interpretation only has to be "rational and consistent with the statute." N.L.R.B. v. Food and Commercial Workers, 484 U.S. 112, 123; 98 L. Ed. 2d 429; 108 S. Ct. 413 (1987). The Secretary's interpretation need not be the only permissible interpretation, nor the interpretation that the Court would have adopted if it had initially considered the matter. Id. at n. 11; Federal Election Comm'n. v. Democratic

Senatorial Campaign Committee, 454 U.S. 27, 39; 70 L. Ed. 2d 23; 102 S. Ct. 38 (1981).

These well-established rules of statutory construction are tellingly unchallenged in Petitioners' petition. At most, Petitioners' arguments indicate that the statutory language at issue may bear the interpretation they desire — not that it cannot bear the interpretation adopted by the Secretary. See Sullivan v. Everhart, 494 U.S. 83, 91-92; 108 L. Ed. 2d 72; 110 S. Ct. 960 (1990). Under these circumstances, where the Secretary's interpretation is at least as plausible as Petitioners' interpretation, "there is little, if any, reason not to defer to [the Secretary's] construction." Good Samaritan Hospital v. Shalala, 508 U.S. ____; 124 L. Ed. 2d 368, 383; 113 S. Ct. 2151 (1993). See also Thomas Jefferson Univ. v. Shalala, 512 U.S. ____; 129 L. Ed. 2d 405; 114 S. Ct. 2381 (1994).

Petitioners do not, and cannot, content that the Secretary's interpretation of the statute is not entitled to deference, since this Court has repeatedly rejected the argument that an agency's interpretation "is not entitled to deference because it represents a sharp break with prior interpretations" of the statute in question. Rust v. Sullivan, 500 U.S. 173; 114 L. Ed. 2d 233, 251; 111 S. Ct. 1759 (1991) (quoting Chevron, 467 U.S. at 862). Instead, Petitioners contend that an agency's revised interpretation of a statute is not entitled to Chevron deference unless the agency supplies a reasoned analysis for adopting the new interpretation (Petition, pp. 10-11). Petitioners' contention lacks merit. This Court unanimously rejected a similar argument in Nationsbank of North

Carolina, N.A. v. Variable Annuity Life Ins. Co., 63 U.S.L.W. 4076, 4079 (Case Nos. 93-1612 and 93-1613, January 17, 1995) (deferring to Comptroller of the Currency's reasonable interpretation of the National Bank Act, and explaining, "any change in the Comptroller's position might reduce, but would not eliminate, the deference we owe his reasoned determinations").

Further, Petitioners' claim that the Secretary should have acknowledged his change of interpretation is unfounded. The Secretary has consistently maintained that he has not changed his interpretation of the statute. The Judicial Officer recognized that the construction of the statute had been settled for "over 50 years" (App, 185a). The Court of Appeals simply did not believe the Secretary, due to the absence of clear authority on this long-settled issue, and the Secretary's "lip service to 608c(18) when making § 608c(5) location adjustments . . . ." (App., 30a).

Petitioners erroneously contend that this case would have been decided differently by the courts of appeals for the D.C., Third, Ninth, and Tenth circuits. Those courts of appeals have followed this Court's controlling precedent in upholding agencies' reasonable interpretations of statutes. Village of Bergen v. F.E.R.C., 33 F. 3d 1385, 1388-89 (D.C. Cir., 1994); Katsis v. I.N.S., 997 F. 2d 1067, 1069, 1074 (3d Cir., 1993), cert. den. ____ U.S. ____; 127 L. Ed. 2d 93; 114 S. Ct. 902 (1994); Louisiana-Pacific Corp. v. Asarco, Inc., 24 F. 3d 1565, 1573-74 (9th Cir., 1994); Exxon Corp. v. Lujan, 970 F. 2d 757, 762-63 (10th Cir., 1992). See also DeOsorio v. I.N.S., 10 F. 3d 1034, 1042 (4th Cir., 1993) ("because we find the Board's

interpretation reasonable and consistent with congressional intent, any inconsistency between this decision and previous Board decisions is immaterial"); Hicks v. Cantrell, 803 F. 2d 789, 793-94 (4th Cir., 1986) ("although the Secretary may have varied his interpretation . . . we must accord his interpretation deference so long as that interpretation is reasonable").

The cases that Petitioners cite for the purported conflict among the circuit courts of appeals do not support Petitioners' position (Petition, pp. 10-11). At most, these cases merely indicate that the consistency of agency interpretation is one factor that is relevant to determine the reasonableness of that interpretation. Thus, an acknowledgement and explanation of any inconsistency is not required, and does not control the outcome of the reasonableness analysis. All of the cases cited by Petitioners upheld the challenged agency interpretations as reasonable, with the exception of one case where the court rejected an unreasonable practice that was contrary to the practice that the agency had consistently advocated before the courts. Mobil Oil Corp. v. E.P.A., 871 F. 2d 149, 152-54 (D.C. Cir., 1989); Sacred Heart Medical Center v. Sullivan, 958 F. 2d 537, 550 (3d Cir., 1992); Mazza v. Secretary of Dept. of Health and Human Services, 903 F. 2d 953, 958, 960 (3d Cir., 1990); Flagstaff Medical Center, Inc. v. Sullivan, 962 F. 2d 879, 887 (9th Cir., 1992); Seldovia Native Assoc., Inc. v. Lujan, 904 F. 2d 1335, 1342-46 (9th Cir., 1990); Exxon Corp., supra., 970 F. 2d at 762-63.

There is also no merit in Petitioners' argument that deference is inappropriate since it is "possible" that the

Secretary did not fully reflect upon the policy that he was effectuating through his interpretation of the statute (Petition, pp. 12-13). Petitioners' attenuated argument has no direct support in the law, which Petitioners misconstrue in an effort to provide a basis for their unfounded position. Pauley v. Bethenergy Mines, Inc., 501 U.S. 680; 115 L. Ed. 2d 604, 624, 630; 111 S. Ct. 2524 (1991) (deference to agency was appropriate due to Congressional delegation of policy-making authority to agencies; Court deferred to agency's interpretation of regulations because that interpretation was reasonable); Wagner Seed Co., Inc. v. Bush, 946 F. 2d 918, 925 (D.C. Cir., 1991), cert. den. 503 U.S. 970; 118 L. Ed. 2d 304; 112 S. Ct. 1584 (1992) ("we are constrained to defer to the [agency's] reasonable interpretation of the statute"). The reasonable policy effectuated by the Secretary's interpretation of the statute is outlined below. Petitioners' policy arguments are properly addressed to legislators or administrators, not to judges. Chevron, supra., 467 U.S. at 864. Finally, Petitioners' argument about the Secretary's "possible" thought process has no support in the record, and cannot form a sound basis for further proceedings.

II. THE SECRETARY PROPERLY INTERPRETED THE STATUTE.

The Court of Appeals upheld the Secretary's interpretation of the statute as "neither unreasonable nor in conflict with Congress' intent" (App., 32a). The Court of Appeals reached the correct result and, if the statute was

ambiguous, correctly applied the second part of the Chevron analysis, as discussed above.

Petitioners' second argument attacks the Secretary's decision based on "reasonable inferences" that Petitioners assert with respect to the statute. This attenuated argument misses the mark, since it focuses on a narrow, insignificant portion of a larger analysis, which is the first half of the Chevron test: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43.

Although the P.E.C. supports the Court of Appeals' decision, the P.E.C. further maintains (as it argued below) that the Secretary's decision was proper because the statute plainly grants the Secretary the authority to make location adjustments under § 608c(5), independent of the restriction in § 608c(18) requiring the Secretary to consider "the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area" when the Secretary acts to "fix minimum prices." The Court of Appeals therefore reached the correct result, but for the wrong reason. In any event, this distinction makes no difference in the outcome of this case, since the Secretary interpreted the statute in accordance with its plain meaning.

In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291; 100 L. Ed. 2d 313; 108

S. Ct. 1811 (1988). Section 608c was the first of the two statutory provisions enacted into law, becoming law in 1935. See Pub. L. No. 320, 49 Stat. 750, 754 - 755. Section 608c(5)(A) grants the Secretary the authority to classify milk in accordance with the form or purpose of its use, and grants the Secretary the authority to "fix[], or provide a method for fixing, minimum prices for each such use classification which all handlers shall pay . . . ." 7 U.S.C. § 608c(5)(A). Congress directed that "[s]uch prices shall be uniform as to all handlers." Section 608c(5) then grants the Secretary the authority to vary the uniformity of the prices by making them "subject . . . to adjustments for [*inter alia*]. . . the locations at which delivery . . . is made to such handlers." Ibid.

As enacted, § 608c(5)(A) authorized the Secretary to classify and to fix minimum prices, directed that the prices should be uniform to such handlers, but authorized the Secretary to adjust the price paid by a given handler — i.e., made not uniform — based upon the location at which that handler took delivery. Plainly, therefore, Congress understood that § 608c(5)(A) empowered the Secretary to do three separate things — classify according to use, fix minimum prices, and vary the uniform application of the minimum price on the basis of the location at which a handler took delivery.

It is plain from the language of § 608c(5)(A) that the location adjustment authority is not related to the fixing of the minimum price. Rather, it is related to the requirement that "[s]uch prices shall be uniform to all handlers," expressly subjecting the 'uniformity" requirement to the authority of the Secretary to 'adjust" the price for the location at which milk is delivered.

A similar analysis is apropos to subsection (B), which requires "payment to all producers. . . delivering milk to the same handlers of uniform prices for all milk delivered, irrespective of the uses made of such milk." In other words, the Secretary is to provide that producers receive uniform prices under the stated conditions — however, once again the Secretary is expressly authorized to vary the requisite uniformity by "adjustments for . . . the locations at which delivery. . . is made." 7 U.S.C. § 608c(5)(B).

In subsection (B) there is no reference to the fixing of a minimum price, as appears in subsection (A). Rather, subsection (B) is devoted solely to the requirement of "payment to all producers . . . of uniform prices," accompanied by the proviso, also present in subsection (A), that the uniform prices may be varied by the location at which delivery is made. Thus, subsection (B) confirms the conclusion that the location adjustment is not a function of fixing a minimum price. Rather, it is a separate grant of authority to the Secretary to vary the uniformity of prices paid by handlers, 7 U.S.C. § 608c(5)(A), and to vary the uniformity of the payments to be made to producers, 7 U.S.C. § 608c(5)(B), on the basis of the locations at which the delivery is made.

With the three authorities created in § 608c(5) in place, in 1937, Congress reenacted § 608c(5), which, to the extent relevant to this litigation, is unchanged from the 1935 version. See Pub. L. No. 137, 50 Stat. 246. At the same time, Congress first enacted what is now § 608c(18). Ibid. and 247. Section 608c(18) directs that the Secretary, prior to enacting a term which

will "fix minimum prices to be paid to producers . . ., or prior to modifying the price fixed," shall conduct an extensive examination of "price of feeds, the available supplies of feeds, and other economicconditions which affect market supply and demand for milk or its products in the marketing area . . . ." Ibid.

Thus, § 608c(18) directly affects the second of the three authorities granted to the Secretary by § 608c(5) — the authority to fix minimum prices. However, § 608c(18) nowhere addresses, or refers to, the other two authorities granted the Secretary by § 608c(5) — the authority to classify, and the authority to vary (i.e., "adjust") the uniformity of prices.

The District Court failed to recognize that 7 U.S.C. 608c(5) and 7 U.S.C. § 608c(18) concern entirely different matters. It makes no sense to conduct a 7 U.S.C. § 608c(18) analysis when amending 7 U.S.C. § 608c(5) location adjustments.

7 U.S.C. § 608c(18) concerns parity prices:

> "The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which then contemplated

marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices." (Emphasis added.)

7 U.S.C. § 608c(18) relates to Congress' declared policy that the Secretary would establish and maintain orderly marketing conditions for agricultural commodities as will establish "parity prices" to farmers. 7 U.S.C. § 602. Essentially, the "parity price" concept is to ensure that farmers receive a level of income from agriculture that will allow them to maintain a certain standard of living. 7 U.S.C. § 1301(2). See also Parker v. Brown, 317 U.S. 341, 355 n. 3; 63 S. Ct. 307; 87 L. Ed. 315 (1942) (describing parity price concept that was set forth in prior version of 7 U.S.C. § 602(1); the present version of that statute

adopts the "parity prices" definition set forth in 7 U.S.C. § 1301, but the parity concept remains intact).

Pursuant to 7 U.S.C. § 608c(18), the Secretary takes the parity price of milk, which is a national figure, and adjusts it based on the "price of feeds, the available supplies of feeds and other economic conditions" to arrive at a minimum price for milk in each area that is governed by a federal milk marketing order. See United States v. Mills, 315 F. 2d 828, 832-33 (4th Cir., 1963), cert. den. 375 U.S. 819; 84 S. Ct. 57; 11 L. Ed. 2d 54 (1963). Thus, under 7 U.S.C. § 608c(18), the Secretary sets the minimum price in each marketing area, which is a reasonable price that assures dairy farmers a certain standard of living, in consideration of their costs of producing milk. 7 U.S.C. § 608c(18) does nothing more.

The Secretary then provides for adjustments to the minimum price in each marketing area, under 7 U.S.C. § 608c(5), which states, in relevant part:

> "In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> "(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to

> adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers." (Emphasis added.)

7 U.S.C. § 608c(5) authorizes the Secretary to adjust the minimum (7 U.S.C. § 608c(18)) price based on factors that are completely separate from the types of factors that the Secretary used to set the minimum price. There is no merit to Petitioners' argument that the Court of Appeals expanded the Secretary's discretion, and that there is now a problem because the Secretary should consider § 608c(18) factors when making § 608c(5) adjustments to minimumprices (Petition, p. 9). This is perhaps best illustrated by focusing on location adjustments, which the Secretary uses to move milk from rural areas, where it is produced, to urban areas, where it is consumed.

It is beyond serious dispute that this necessary movement of milk is dependent on 7 U.S.C. § 608c(5) location adjustments. What is important to recognize, however, is that the locations at which milk is delivered, and the reasons for delivering it there, are unrelated to the "price of feeds, the availability of feeds" or other "parity" issues included in the 7 U.S.C. § 608c(18) minimum price fixing criteria. Milk is moved in the Southern Michigan marketing area based on production levels and consumption needs in various locations, regardless of how much it might cost neighboring producers to produce milk in those locations.

For example, the Secretary could establish a 0¢ zone and a -5¢ zone to move milk from the -5¢ zone, where it is produced, to the 0¢ zone, where it is needed for consumption, even though the price and availability of feeds is the same in each zone. If the Secretary were required to base a location adjustment on the price and availability of feeds under 7 U.S.C. § 608c(18), he would be unable to make a necessary adjustment, even though it is expressly authorized under 7 U.S.C. § 608c(5). The District Court decision forced the Secretary into this unworkable position, however, by holding that he must base 7 U.S.C. § 608c(5) location adjustments on 7 U.S.C. § 608c(18) criteria. The District Court's decision ignored the plain language of the Act, and the realities of the federal milk pricing scheme.

The Court of Appeals properly reversed the District Court's decision, but should have based its decision on the first part of the Chevron analysis, and never reached the second part. This distinction makes no difference, however, since the plain meaning of the statute conforms to the Secretary's interpretation. Moreover, the plain-meaning arguments set forth above give further support to the Secretary's interpretation, in the event that the statute is considered to be ambiguous. In any event, the correct result has been achieved in this case, and there is no sound basis for further judicial proceedings.

CONCLUSION

The Producers Equalization Committee respectfully requests that this Court deny Petitioners' petition for a writ of certiorari.

Respectfully submitted,

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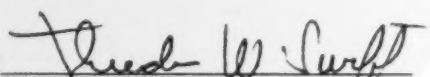
By: 

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